UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERSTATE MANAGEMENT COMPANY, L.L.C.
as agent for BRE NEWTON HOTELS PROPERTY
OWNER, LLC d/b/a RESIDENCE INN BY
MARRIOTT SANTA FE ALL-SUITES HOTEL

and **Case 28-CA-206663**

RESIDENCE MARRIOTT COMMITTEE

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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I. INTRODUCTION

In a Complaint issued on January 9, 2018, the Regional Director of Region 28 (the Regional Director) of the National Labor Relations Board (the Board) alleged that Interstate Management Company, L.L.C. as Agent for BRE Newtown Hotels Property Owner, L.L.C. d/b/a Residence Inn by Marriott Santa Fe All-Suites Hotel (Respondent) promulgated and has maintained in a nationwide Business Code of Conduct two work rules that would reasonably tend to chill employees in the exercise of their rights under Section 7 of the National Labor Relations Act (the Act). On September 11, 2018, Administrative Law Judge John T. Giannopoulos (Judge Giannopoulos) issued a decision and recommended an order finding those two rules to be unlawful, as alleged, and requiring Respondent to rescind the rules, post notices to employees at all of its facilities nationwide, and distribute inserts for its Business Code of Conduct stating that the unlawful rules have been rescinded or with new and lawfully worded rules on adhesive backing that will cover the unlawfully broad rules. Respondent excepts to the Administrative Law Judge's finding that the rules were unlawful and to his recommended order requiring it to post notices nationwide and make any distributions notifying employees of the change or offering new lawfully worded rules.

As explained below, the Judge Giannopoulos' findings that two of Respondent's rules were unlawful and his recommended order is well-supported by the facts and the law. Accordingly, Counsel for the General Counsel respectfully requests that the Board deny Respondent's exceptions and issue an Order requiring Respondent to provide a full and complete remedy for the promulgation and maintenance of all of its unlawful, coercive work rules, including the posting of notices to employees at all of its facilities nationwide and distribution of an insert for Respondent's Business Code of Conduct stating that the unlawful rules have been

rescinded or the provision of new and lawfully worded rules on adhesive backing that will cover the unlawfully broad rules.

Below, after describing the legal standards applied by the Board in assessing the lawfulness of work rules, the General Counsel will apply those standards to each of the rules found to be unlawful by Judge Giannopoulos.

II. STATEMENT OF THE CASE

Respondent is a hotel management company that operates about 400 branded hotels throughout the United States, including the Residence Inn by Marriott Santa Fe All-Suites Hotel in Santa Fe, New Mexico, and employs about 30,000 employees in the United States. Tr. 162-166; ALJ 2:15[1]. Respondent's maintains a Business Code of Conduct that applies to all of its employees throughout the United States. Tr. 177; ALJ 8:4-10; R. Exceptions Brief 2. Employees get a physical copy of the Code of Conduct, in both English and Spanish, when they are hired. Tr. 178; ALJ 8:4-10. An electronic version is also available on the company's intranet site. *Id.* In paragraphs 5(b)(1) and 5(b)(2) the General Counsel alleges that since about March 21,2017, Respondent has maintained two overly broad and discriminatory rules in its Business Code of Conduct. GC Ex. 1(g).

The Information Protection policy is located in Section 6 of Respondent's Business Code of Conduct. GC 3; Tr. 164; ALJ 8:20. The policy sets forth guidelines on protecting Respondent's "confidential information." The policy in relevant part states:

> **Section 6: <u>Information Protection</u>**
>
> One of the Company's most valuable assets is information and the information systems we use to process and store that data. Keeping confidential our

[1] References to the trial transcript will be denoted by "Tr. [page number]." References to the General Counsel's exhibits will be denoted by "GC Ex. [page number]." References to Respondent's Brief in Support of its Exceptions will be denoted as "R. Exceptions Brief [page number]." References to the Judge's Decision will be denoted as "ALJD [page number: line number]."

> Company's non-public information is important to the success of our Company. Confidential information includes, but is not limited to:
>
> - personal information, which is defined broadly to include any information that can be associated with or traced to any individual, such as an individual's name, address, telephone number, e-mail address, bank and credit card information, social security number, etc. The personal information covered by this Code could pertain to a customer, potential customer, associate, former associate, owner or joint venture partner;
>
> […]
>
> Every associate is responsible for utilizing the Company's information solely for authorized business purposes. In addition, every associate is responsible for protecting the Company's confidential information and information systems from unauthorized internal and external access.

GC Ex. 3.

The Government Investigations policy is located in Section 16. GC 3; Tr. 173. The policy regulates employees' participation in government investigations. Tr. 173. The policy at page 5 through 6 states:

> **Section 16: <u>Government Investigations</u>**
>
> We promote cooperation with law enforcement agencies and government agencies. However, rights of third parties, associates, customers, suppliers, and others may be affected. In most cases, the Company requires an official written request or a subpoena describing the requested information or documents and will ensure that the information requested is limited to information legitimately required for the agency's or party's purpose. Therefore, requests from the police, Internal Revenue Service and other regulatory authorities must not be answered without first obtaining clearance from our Legal Department.

In his decision Judge Giannopoulos correctly found that in practice these rules would severely limit Section 7 rights and infringe on employees' rights to engaged in union and protected concerted activities. These findings by the ALJ are the crux of Respondent's exceptions, none of which has merit.

III. ARGUMENT AND ANALYSIS

a. The Legal Standard Set Forth in *Boeing*

In *Boeing Co.*, the Board overruled the standard the Board established in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (*Lutheran Heritage*), for evaluating the lawfulness of employer rules that do not explicitly restrict employees' exercise of their rights under Section 7 of the Act. 365 NLRB No. 154, slip op. at 2 (2017). The Board held that, when evaluating rules that, when reasonably interpreted, would potentially interfere with employees' rights under Section 7 of the Act, it will balance the nature and extent of the potential impact on Section 7 rights against legitimate justifications associated with the rule. *Id.* at slip op. at 3. In conducting this balancing, "when a rule, reasonably interpreted, *would* prohibit or interfere with the exercise of NLRA rights, the mere existence of some plausible business justification will not automatically render the rule lawful." *Id.* at slip op. at 16.

The Board announced that, prospectively, three categories of rules will be delineated to provide greater clarity and certainty:

- *Category 1* will include rules that the Board designates as lawful to maintain, either because (a) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of Section 7 rights; or (b) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. An example of a Category 1(a) rule are rules requiring employees to abide by basic standards of civility, and an example of a Category 1(b) rule is the no-camera requirement at issue in *Boeing*.

- *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with Section 7 rights, and if so, whether any adverse impact on Section 7-protected conduct is outweighed by legitimate justifications.

- *Category 3* will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit Section 7-protected conduct, and the adverse impact on Section 7 rights is not outweighed by justifications associated with the rule. An example would be a rule that prohibits employees from discussing wages or benefits with one another.

Id. at slip op. at 3-4.

The Board then set out five considerations to be emphasized in engaging in this analysis:

1. the Board has a responsibility to give the parties certainty and clarity, so it will say which rules fall into which category in future cases, though it may redesignate rules from one category to another from time to time;

2. the Board may differentiate among different types of protected activities, weighing their importance in relation to one another, taking into consideration any special importance they may have in a particular industry or work setting or in light of particular events;

3. when a rule would not prohibit or interfere with Section 7 rights, the rule is lawful without considering business justification, but, when it would prohibit or interfere with Section 7 rights, the mere existence of some plausible business justification will not automatically render the rule lawful;

4. when the Board interprets any rule's impact on employees, the focus should be on the employee's perspective; and

5. the Board may find that an employer may lawfully maintain a rule, despite possible impact on Section 7 activity, even though the rule cannot lawfully be applied to employees who engaged in Section 7 activity.

Id. at slip op. at 15-16.

In regards to consideration number three above, the Board stated that when a rule, reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights, the mere existence of some plausible business justification will not automatically render the rule lawful. *Id.* at slip op. at 16. The Board has made clear that parties may present evidence about the reasons for adopting rules. *Id.* at slip op. at 15. The Board may also take into consideration particular events that may shed light on the purpose or purposes served by a challenged rule or on the impact of its maintenance on protected rights. *Id.* at slip op. at 16.

As noted by Judge Giannopoulos, in evaluating the lawfulness of the two work rules here, what must be evaluated is whether the rules, "when reasonable interpreted," would potentially interfere with the exercise of Section would potentially interfere with the exercise of Section 7

rights, and if so, (i) the nature and extent of the rule's potential impact on Section 7 rights, and (ii) the legitimate business justification associated with the rule. *Id.* slip. op. at 14. ALJ 17:20.

b. Respondent's Rule in its Business Code of Conduct Requiring Employees to Keep Confidential the Names, Addresses, Telephone Numbers, and Email Addresses of Their Coworkers or Former Coworkers Violates Section 8(a)(1) Under the Legal Standard Set Forth in *Boeing*

Respondent's Information Protection policy prohibits the disclosure of confidential information and defines confidential information as including "personal information, which is defined broadly to include any information that can be associated with or traced to any individual, such as an individual's name, address, telephone number, e-mail address." The rule further specifies that it is intended to apply to information about associates. Thus, the rule directly interferes with the right of employees to share their own names and contact information and the names and contact information of other employees with other employees, labor organizations, government agencies, or other third parties, in furtherance of union and protected concerted activities, and thereby directly interferes with a core Section 7 right.

1. A Reasonable Interpretation of the Rule

Judge Giannopoulos appropriately found that, when reasonably interpreted, Respondent's rule on Information Protection in Section 6 of Respondent's Code of Conduct interferes with the exercise of employee Section 7 rights. ALJ 20:21-22. As he stated in his decision, the Board has long held that employees can lawfully use information that comes to their attention in the normal course of their work activity and association with colleagues, including the names and contact information of their coworkers, for self-organizing purposes. ALJ 20: 22-25. *See Ridgley Manufacturing* 207 NLRB 193, 196–197 (1973) (Board held that employees can lawfully use information that comes to their attention in the normal course of their work and association with colleagues); *Gray Flooring*, 212 NLRB 668 (1974) (Board held that an employee was engaged

in protected concerted activity by memorizing the names of coworkers for timecards for the purpose of union activity).

Respondent attempts to distinguish *Ridgley Manufacturing* by stating that the employee information it seeks to protect with its Information Protection policy, e.g. company information stored in its databases, is not information available in the course of employees' normal work relationship. R. Exceptions Brief 14, 18. The section of the rule at issue is not limited to database information. In fact, there is no mention of "database(s)" anywhere in the rule, so the limitation is far from clear. Second, while database information may not be available to employees during the normal course of the day, the rule at issue is worded broadly and encompasses information different categories of employees would readily have access to such as the names of their fellow employees. Respondent presented no evidence refuting the existence and access employees have to this information.

2. The Nature and Extent of the Rule's Potential Impact on Section 7 Rights

Judge Giannopoulos correctly found the impact of the rule to be significant. ALJ 21:12. As noted by the Court of Appeals for the District of Columbia Circuit, the type of information deemed confidential here—employee names and contact information—is the type of information "that employees must be permitted to gather and share among themselves and with union organizers in exercising their Section 7 rights." *Quicken Loans, Inc. v. NLRB,* 830 F.3d 542, 548 (D.C. Cir. 2016).

3. The Impact of the Rule is Outweighed By Respondent's Business Justification Associated with the Rule

Respondent's asserted business interests do not justify a rule of this nature. Although Respondent asserts that the rule was intended to ensure compliance with Respondent's legal

obligations with respect to employees' personally identifiable information (PII), as Judge Giannopoulos notes, the rule does not use the term PII and is not limited to apply only to disclosure of PII maintained by Respondent as part of its business operations. ALJ 20-21: 45-46 and 1; R. Exceptions Brief 4, 11.

Similarly, although Respondent asserts that the rule is intended to protect employee safety and privacy, there is no explanation in the rule saying that confidential information does not prohibit employee Section 7 activity, but is instead meant for the protection of employee safety. ALJ 21:3-5; R. Exceptions Brief 3-5.

Although Respondent asserts that the rule is intended to avoid placing it at a competitive disadvantage, by giving competitors access to information that could be used to recruit employees, the rule applies to far more employees than those, such as managers, who would likely be in a position to use information maintained by Respondent in this manner. While the rule does use the term "our Company" as noted by Judge Giannopoulos, in no way does the rule explicitly limit the protected information to company non-public information contained in Respondent's databases. ALJ 20:7-8. Further, the rule is not limited to apply only to employees' disclosure of information in their capacity as agents of Respondent.

Judge Giannopoulos held that Respondent's business justifications for the information protection rule as alleged are decidedly outweighed by the adverse impact on employee rights. ALJ 21:18-19. As he notes, Respondent can accomplish all of its presumed justifications with a more narrowly tailored rule that does not interfere with employees protected activity, including the right to share the names and contact information of their coworkers with a union. ALJ 21:20-23.

c. Respondent's Rule in its Business Code of Conduct Requiring that Employees Receive Clearance Before Answering Requests from the Police, Internal Revenue Service, or Other Regulatory Authority Violates Section 8(a)(1) Under the Legal Standard Set Forth in *Boeing*

In Respondent's Business Code of Conduct it maintains a provision in the Government Investigation policies prohibiting employees from answering requests from regulatory authorities without first obtaining clearance from Respondent's Legal Department. GC 3. Thus, the rule directly interferes with the ability of employees to participate in Board investigations and investigations of other government agencies that employees concertedly initiated in order to seek improvements to their terms and conditions of employment. This direct interference with employees' concerted activities and with the Board's own processes has a severe impact on Section 7 rights.

1. A Reasonable Interpretation of the Rule

Judge Giannopoulos notes that a reasonable interpretation of the government investigations rule requires employees to first obtain clearance from Respondent's legal department before answering requests from the police or regulatory authorities. ALJ 17:26-28. Judge Giannopoulos agrees with Counsel for the General Counsel that the reference to "regulatory authorities" encompasses the Board and therefore directly interferes with employees' concerted activities and with the Board's own processes has a severe impact on Section 7 rights. ALJ 18:5.

Respondent argues that the rule is limited to only "official written requests" or "subpoenas," and that Respondent is seeking to prevent employees from giving an official response on behalf of the company. R. Exceptions Brief 5, 27. However, as Judge Giannopoulos states, the rule contains no such limitations. ALJ 18:6-7. Judge Giannopoulos cites *Laidlaw Transit, Inc.,* noting that there is no evidence that employees have ever been told of this

purported limitation. 15 NLRB 79, 83 (1994) (any 10 clarification or narrowed interpretation of an overly broad rule must be effectively communicated to an employer's work force "before the Board will conclude that the impact of facially illegal rules has been eliminated."). ALJ 18:9-12. Respondent contends that this rule is properly clarified via an NLRB poster, however, this is not supported by Board precedent as a sufficient cure. See *Passavant Memorial Area Hospital,* 237 NLRB 138, 138 (1978). Respondent's Business Code of Conduct is given to all Interstate employees throughout the United States. There was no evidence presented at trial that the NLRB Employee Rights poster is posted at any locations outside of Santa Fe. Tr. 125–128; ALJ 18: Fn.23; R. Exceptions Brief 7. Finally, the fact that employees are given a copy of the Business Code of Conduct when they are hired, it is reasonable for employees to conclude they would believe that its provisions generally govern their interaction with government agencies, including Board investigators. ALJ 18:12-14.

2. The Nature and Extent of the Rule's Potential Impact on Section 7 Rights

Judge Giannopoulos found the impact on Section 7 rights to be "severe". ALJ 18: 21. An employee contacted by the Board for testimony in an unfair labor practice investigation or hearing would certainly understand this rule to require the employee to request permission of Respondent's Legal Department before responding to the inquiry. Similarly, an employee contacted for evidence related to a concerted claim brought before any other government agency would understand the rule to require the employee to secure Respondent's permission. The potential for coercion and intimidation is very clear. If employees are required to identify themselves to their employer a having been contacted by a Board investigate, and then required to receive pre-clearance from the company before providing evidence, there is a danger of not only intimidation, but of biased or inaccurate witness testimony and even an encouragement not

to participate. ALJ 19:12-19. As Judge Giannopoulos reiterates, this is a severe infringement upon employee Section 7 rights. ALJ 19:21.

3. The Impact of the Rule is Outweighed By Respondent's Business Justification Associated with the Rule

Respondent's business interest does not outweigh this serious impact on Section 7 rights. As Judge Giannopoulos notes, if Respondent is merely seeking to prevent employees from providing an official response on behalf of Respondent, a more narrowly tailored rule would serve the same purpose. ALJ 19:23-27.

IV. CONCLUSION

Based on the foregoing, the General Counsel respectfully requests that the Board deny Respondent's Exceptions, adopt the portions of the Administrative Law Judge's decision and recommended order to which Respondent excepts, and order a full and complete remedy for Respondent's maintenance of unlawful rules, including the posting of notices to employees at Respondent's facilities nationwide.

Dated at Phoenix, Arizona this 23rd day of October, 2018.

Respectfully submitted,

/s/ Judith Dávila

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CERTIFICATE OF SERVICE

I hereby certify that a copy of **GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS** in *Interstate Management Company, LLC as agent for BRE Newton Hotels Property Owner, LLC d/b/a Residence Inn by Marriott Santa Fe All-Suites Hotel*, Case 28-CA-206663, was E-Filed and served by E-mail on this 23rd day of October, on the following:

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